12-0105-cv(L),

12-0109-cv(CON), 12-0111-cv(CON), 12-0157-cv(CON), 12-0158-cv(CON), 12-0163-cv(CON), 12-0164-cv(CON), 12-0170-cv(CON), 12-0176-cv(CON), 12-0185-cv(CON), 12-0189-cv(CON), 12-0214-cv(CON), 12-0909-cv(CON), 12-0914-cv(CON), 12-0916-cv(CON), 12-0919-cv(CON), 12-0920-cv(CON), 12-0923-cv(CON), 12-0924-cv(CON), 12-0926-cv(CON), 12-0939-cv(CON), 12-0943-cv(CON), 12-0951-cv(CON), 12-0968-cv(CON), 12-0971-cv(CON), 12-4694-cv(CON), 12-4829-cv(CON), 12-4865-cv(CON)

United States Court of Appeals
for the
Second Circuit

NML CAPITAL, LTD., AURELIUS CAPITAL MASTER, LTD., ACP MASTER, LTD., BLUE ANGEL CAPITAL I LLC, AURELIUS OPPORTUNITIES FUND II, LLC, PABLO ALBERTO VARELA, LILA INES BURGUENO, MIRTA SUSANA DIEGUEZ, MARIA EVANGELINA CARBALLO, LEANDRO DANIEL POMILIO, SUSANA AQUERRETA, MARIA ELENA CORRAL, TERESA MUNOZ DE CORRAL, NORMA ELSA LAVORATO, CARMEN IRMA LAVORATO, CESAR RUBEN VAZQUEZ, NORMA HAYDEE GINES, MARTA AZUCENA VAZQUEZ, OLIFANT FUND, LTD.,

Plaintiffs-Appellees,

v.

THE REPUBLIC OF ARGENTINA,

Defendant-Appellant,

THE BANK OF NEW YORK MELLON, as Indenture Trustee,
EXCHANGE BONDHOLDER GROUP, FINTECH ADVISORY INC.,

Non-Party Appellants,

EURO BONDHOLDERS, ICE CANYON LLC,

Intervenors.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR NON-PARTY APPELLANT FINTECH ADVISORY INC.

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PRELIMINARY STATEMENT[1]

Fintech agreed to accept a 66% haircut on an $834 million investment pursuant to express contracts that require the Republic to pay certain sums to Fintech over time. The only risk within Fintech's reasonable expectation in entering into this arrangement was whether the Republic would honor the new payments to which it agreed. Now, seven years later, Fintech finds itself in the incredible circumstance of being deprived of its payments and property unless the Republic pays other parties under other contracts which have been in dispute for years. Try as they might, Appellees have offered no legal or equitable justification for such an extraordinary result.

Fintech takes no position on the underlying question of whether the Republic ultimately should pay Appellees. Unfortunately, however, Fintech's position, and that of the other Exchange Bondholders, has been mixed up in the "hammer and tong" dispute between Appellees and the Republic, complete with colorful and dramatic assertions of "vultures," "lawless regime," and the Republic's alleged "unprecedented course of misconduct." Whatever import such parrying may have in the underlying dispute, it should not cloud the reality of what the current Injunction does to innocent non-parties such as Fintech.

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[1] All defined terms have the meaning set forth in Fintech's December 28, 2012 opening brief ("Fintech Br.").

Respectfully, this Court remanded the question of the impact of the Injunction on what had been absent third parties for serious consideration, which had not heretofore occurred. Appellees' assertion that the remand was merely to permit the District Court to plug in a few names as "Participants" under the Injunction Order cannot be taken seriously. Rather, this Court asked the District Court to address whether the Injunction as applied to non-parties is reasonable. The fact is that the District Court gave little to no consideration to the impact of the Injunction on the Exchange Bondholders, and the few conclusions concerning third parties stated in the Injunction Opinion are unsupported, illogical, or both. The Exchange Bondholders, who face becoming embroiled in litigation due to an order which quarantines their property, legally are entitled to far more consideration, and respectfully, upon proper consideration of the impact on third parties, the Injunction as crafted cannot stand. It provides a result as to the Exchange Bondholders that is unsupported by valid precedent, and is inequitable, unconstitutional, and contrary to statutory dictates. Appellees' inability to legally support the result, leaving them instead to point over and over again to the Republic's allegedly "outrageous conduct" and their frustrations over the same, makes clear that the current result cannot stand. The November 21 Orders must be vacated.

ARGUMENT

I. The District Court's November 21 Orders Cannot Survive Analysis Under the Proper Standard of Review and the Scope of the Remand

A. The District Court's Legal Conclusions Should Be Reviewed De Novo

Fintech respectfully submits that the Injunction is subject to de novo review because it is based upon significant errors of law. See Malkentzos v. DeBuono, 102 F.3d 50, 54 (2d Cir. 1996) (conclusions of law are reviewed de novo); County of Seneca v. Cheney, 12 F.3d 8, 11 (2d Cir. 1993) (same).

As set out below, among other things, the District Court made significant errors of law by improperly failing to (i) recognize and take into account the legal principle that the money in the hands of an indenture trustee belongs to the beneficiary of that trustee and cannot be divested; (ii) consider whether its injunction amounts to a "judicial taking" in violation of the Fifth Amendment; and (iii) apply the rigorous standard for aiding and abetting in determining whether the concert of action standard in Fed. R. Civ. P. 65 had been met.

B. The District Court Abused its Discretion by Failing to Properly Address the Issues Remanded To It By the October 26 Decision

Although the October 26 Decision specifically directed the District Court to address the very issue impacting the Exchange Bondholders, namely, the effect of the Injunction on third-parties, the District Court issued the November 21 Orders without heeding this Court's instructions. The Injunction Opinion issued

immediately after lightning-paced briefing and without oral argument contains little mention of the effect on third party bondholders and is replete with unsupported conclusory statements such as the following which reflect pivotal portions of the Court's opinion:

- That third parties, including the Trustee and DTC, "surely are in 'active concert or participation'" with Argentina. SPE 1370-71; Fintech Br. p. 20. The Injunction Opinion does not explain how independent third parties, which the Court concedes are "probably" not agents of Argentina (SPE 1369-70), are "aiders and abetters."

- That "if Argentina attempts to make payments to the exchange bondholders, contrary to the ruling of the Court of Appeals and thus contrary to law, this would not involve the normal and proper situation dealt with by BNY under the indenture, and dealt with by others in the chain." SPE-1370-71. The Injunction Opinion contains no explanation as to what the District Court means by the "normal and proper situation," or why this observation has any bearing on the scope of its Injunction. Fintech Br. pp. 23-24.

- Despite its acknowledgement that the Exchange Bondholders bargained for "certainty" the District Court made no attempt to assess the negative impact on that investment-backed expectation if the Injunction is implemented. Fintech Br. pp. 18-19.

Such conclusory and unexplained findings constitute an abuse of discretion, warranting reversal and remand. Fintech Br. pp. 19-20 (citing CFTC v. Walsh, 658 F.3d 194, 200 (2d Cir. 2011); In re Iridium Operating LLC, 478 F.3d 452, 466 (2d Cir. 2007); Burnett v. Physician's Online, Inc., 99 F.3d 72, 77 (2d Cir. 1996)).

Appellees' principal attempt to defend the District Court's November 21 Orders is to argue that this Court's scope of remand was narrow and that

challenges to the effect of the Injunction upon non-parties are precluded.[2] NML Br. p. 31.[3] In making this argument, Appellees conspicuously ignore the portion of this Court's October 26 Decision which *declined* to address the issue of "whether the Injunctions' application to [the non-parties] is reasonable" and instead, specifically requested that the District Court consider and analyze the interests of third parties. October 26 Decision p. 28. As such, Appellees' erroneous suggestion that non-parties such as Fintech are foreclosed from arguing the impact of the Injunction on them fails as this Court explicitly directed the District Court to address this issue on remand – which it did not sufficiently do.

[2] Law of the case does not apply to non-parties who have not had their day in court. Stevens v. Danek Med., Inc., 1999 WL 33217282, at *7-8 (S.D. Fla. Apr. 16, 1999) (citing 4A Wright & Miller, Federal Practice & Procedure, § 4478, at 832 (Supp. 1998); see In re DG Acquisition Corp., 151 F.3d 75, 86 (2d Cir. 1998)).

[3] "NML Br." refers to the Joint Response Brief of Plaintiffs-Appellees NML Capital, Ltd. and Oliant Fund, Ltd., Dkt. 821. "Aurelius Br." refers to the Brief of Plaintiffs-Appellees Aurelius Capital Master, Ltd. et al., Dkt. 820. "Puente Br." refers to the Brief of Amicus Curiae Puente Hnos. Sociedad Bolsa S.A., Dkt. 701. "Prat-Gay Br." refers to the Brief for Alfonso Prat-Gay as Amicus Curiae, Dkt. 697-2. "Mann Br." refers to the Supplemental Brief for Amici Curiae Professor Ronald Mann and EM Ltd., Dkt. 705. "EBG Br." refers to the Brief for Non-Party Appellants Exchange Bondholder Group, Dkt. 642. "Euro Bondholders Br." refers to the Brief for Non-Party Intervenors Euro Bondholders, Dkt. 702. "Ice Canyon Br." refers to the Brief of Intervenor Ice Canyon LLC, Dkt. 698.

II. The Injunction Improperly Has Seized Property Belonging to the Exchange Bondholders

A. The Injunction Order Violates Principles of Equity by Seizing the Exchange Bondholders' Property

Equity requires the District Court to "mould each decree to the necessities of the particular case." Forschner Group v. Arrow Trading Co., 124 F.3d 402, 406 (2d Cir. 1997). Remedies must be narrowly tailored to fit specific legal violations. See Patsy's Brand, Inc. v. I.O.B. Realty, Inc., 317 F.3d 209, 220 (2d Cir. 2003). The November 21 Orders are not "narrowly tailored." The District Court could have compelled the Republic to pay the Original Bondholders without infringing upon the rights of the Exchange Bondholders, and such a remedy properly would have addressed the concerns raised in the October 26 Decision. See Fintech Br. pp. 33-35. Appellees did not address this alternative proposal made in Fintech's opening brief.

Instead of a straightforward and defensible order, the District Court flouted principles of equity by choosing, without proper fact-finding or analysis, to unravel tens of billions of dollars of bond restructuring transactions previously upheld by this Court. The Injunction Opinion infringes upon the rights of innocent non-parties who are not involved in the Republic's decisions with respect to payment of the Original Bondholders, and improperly attempts to make the repayment of the obligations owed by contract to the Exchange Bondholders unlawful. As this

Court has explained, such "[a]n injunction is overbroad when it restrains defendants from engaging in legal conduct." Shaknes v. Berlin, 689 F.3d 244, 257 (2d Cir. 2012) (citation omitted).

The District Court entered the November 21 Orders without acknowledging the pivotal fact that the payments that its Injunction contemplates freezing belong to the non-party Exchange Bondholders. The Indenture clearly states that the Trustee holds all monies paid to it under the Indenture "in trust" for itself and the Exchange Bondholders. See SPE-648 (§ 3.1); SPE-650 (§ 3.5(a)); SPE-665 (§ 5.5); SPE-682-83 (§ 11.2). The beneficial owners of the Exchange Bonds, such as Fintech, hold equitable title to the Trust assets and are the "real owners" of the Trust property. See Willis Mgmt. (Vt.), Ltd. v. United States, 652 F.3d 236, 245 (2d Cir. 2011) ("… if a constructive trust properly should be imposed on particular property that was in the possession of the defendant, it was never truly the defendant's property and is not subject to forfeiture . . . "); Brown v. J.P. Morgan & Co., Inc., 265 A.D. 631, 635, 40 N.Y.S. 2d 229, 233 (1st Dep't 1943) (bondholder cannot attach money in the hands of trustee for other bondholders because the money "belongs to the [other] bondholders"), aff'd, 295 N.Y. 867, 67 N.E.2d 263 (1946).[4]

[4] See Fintech Br. pp. 26-27 (citing, inter alia, United States v. Coluccio, 51 F.3d 337, 341-42 (2d Cir. 1995); In re Gans, 75 B.R. 474, 490 (Bankr. S.D.N.Y. 1987); Wellpoint, Inc. v. C.I.R., 599 F.3d 641, 648 (7th Cir. 2010)).

Appellees have not in any meaningful way addressed this critical point. It is no answer to say that this result only occurs if the Republic decides not to pay the Original Bondholders. The plain fact is that the Injunction Order requires that the Exchange Bondholders' property be frozen if the Republic does not pay the Original Bondholders. The District Court has not addressed the patent inequity of that result. Instead, the District Court imposed an injunction that is manifestly inequitable: it uses the non-party Exchange Bondholders' contractual right to be paid as a weapon against the Republic to coerce it to comply with another party's judgment, a judgment for which the Exchange Bondholders are in no way accountable.[5]

B. Appellees' Effort to Diminish and Justify the Harm to Non-Parties Fails

Appellees make four arguments in support of their contention that the Injunction does not harm the Exchange Bondholders: (i) the Republic has adequate resources to meet its obligations and the likelihood of the Republic defaulting on the Exchange Bonds is "hard to believe" (NML Br. pp. 31-32); (ii) the 2005 Prospectus warned that there would be "no assurance" that litigation under the Original Bonds would not "interfere with payments" (NML Br. p. 33);

[5] Appellees' absurd argument that Fintech was "complicit" in the Republic's breach and seeks to permanently enshrine its priority position not only is inaccurate, but illustrates Appellees' need to stoop to mud-slinging in the absence of bona fide arguments. NML Br. pp. 35-36 n.5.

(iii) courts have issued orders similar to the Injunction here purportedly barring payment to one party without payment to another (NML Br. p. 34); and (iv) harm to the Exchange Bondholders is not "outweighed" by the harm of "competing equitable considerations" (NML Br. pp. 34-35). These arguments are unavailing.

First, the amicus submissions proffered by Puente Hnos. Sociedad de Bolsa S.A. and Alfonso Prat-Gay specifically question whether the Republic has the ability to compensate the Original Bondholders and the Exchange Bondholders. Puente Br. pp. 25-27; Prat-Gay Br. p. 8. It is entirely speculative as to what the Republic's reserves are and quite simplistic to assert that holding "more than $40 billion" in cash reserves means there is no problem making an immediate payment of 1/40th of that amount to Appellees. NML Br. p. 4. Certainly, an injunction should not rise or fall on such speculation. Moreover, Appellees' assertions that it is "hard to believe" that the Republic "needlessly" will trigger another default are not only speculation, but are contradicted by the facts and course of conduct to date. NML Br. p. 32. Again, a drastic injunction cannot rise and fall on such unwarranted speculation. Finally, of course, this simplistic argument also ignores the critical fact that the Lock Law prevents the Republic from paying the Original Bondholders. Appellees are all too happy to "gamble" with the Exchange Bondholders' legal right to be paid.

Second, the generic risk identified in the 2005 Prospectus that litigation with the Original Bondholders might "interfere with payments" is entitled to little if any weight. A-466. The Exchange Bondholders were not warned of and did not bargain for the possibility that the very contractual rights and vastly reduced payments they agreed to accept which were upheld by this Court would be used as a mechanism to try to force the Original Bondholders, the holdout creditors, to be paid. See pp. 7-8, supra; see also Fintech Br. p. 30. Indeed, the ruling of this Court permitting the 2005 Exchange Offer to proceed stripped the disclosure of any weight. Had the 2005 Exchange Offer successfully been challenged, Fintech would have remained an Original Bondholder and not now subject to the impact of the Injunction. And, of course, the 2005 ruling of this Court assured the Exchange Bondholders that their investments would be sound, and gave comfort for participating in the 2010 Exchange Offer. The Court ruling helped to shape Fintech's reasonable investment expectations.

Third, relying upon three cases, Appellees insist that courts have granted relief comparable to the extraordinary relief afforded in the Injunction: Chrysler Corp. v. Fedders Corp., 63 A.D.2d 567, 569 (App. Div. 1978), Cal. Serv. Emps. Health & Welfare Tr. Fund v. Advance Bldg. Maint., 06-3078, 2007 U.S. Dist. LEXIS 83987 (N.D. Cal. Nov. 1, 2007), and Yudell Tr. I et al. v. API Westchester Assocs., 227 A.D.2d 471 (2d Dep't 1996). However, these cases are inapposite

and provide no such support. In Chrysler, the court issued a preliminary injunction pending final judgment and did not prevent the Series A shareholders (in the Exchange Bondholders' shoes) from receiving dividend payments. Here, however, the Injunction, which is final, purports to prevent the Exchange Bondholders from receiving distributions rightfully owed to them – possibly forever. In Cal. Serv. Emps., a preliminary injunction was granted to prevent paying money to the officers which would have depleted funds needed to later pay a judgment. That injunction simply ensured in advance that a party could pay after judgment. Lastly, Yudell addresses the entirely inapposite issue of a right of first refusal for the purchase of real property. The party in Yudell had no existing interest in the property subject to restraint other than a desire to purchase it. Here, property already belonging to the Exchange Bondholders is subject to restraint. Accordingly, Appellees' contention that the remedy provided by the Injunction is comparable to what other courts have done, fails.[6]

[6] Appellees also cite somewhat quietly Red Mountain Fin., Inc. v. Democratic Republic of Congo, No. CV 00-0164 R (C.D. Cal. May 29, 2001) (JA-1369-72), Elliott Assoc. L.P. v. Banco de la Nacion, No. 2000/QR/92 (Court of Appeals of Brussels 8th Chamber Sept. 26, 2000) (JA-157-60) and LNC Invs. LLC v. Republic of Nicaragua, Folio 2000 No. 1061, R.K. 240/03 (Commercial Ct. of Brussels Sept. 11, 2003) (JA-1334-53) in support of their contention that other courts have "ordered an equal treatment remedy." NML Br. p. 29. However, these cases have no precedential value here. In Red Mountain, the U.S. District Court for the Central District of California denied a motion for specific performance of the pari passu clause but nonetheless, without analysis, enjoined a sovereign from making payments on its debts. A-1369. Moreover, there is no indication that the

Fourth, Appellees rely on Nemer Jeep-Eagle v. Jeep-Eagle Sales Corp., 992 F.2d 430, 436 (2d Cir. 1993), to argue that this Court has recognized that harm to a third party by an injunction can be outweighed by other considerations. NML pp. 34-35. Nemer, however, does not help Appellees. That case involved an injunction issued to maintain the status quo pending arbitration, based upon express contractual language. Moreover, the subject of the restraint was the interest in having a dealership – not property already belonging to the non-party.

III. The District Court Failed To Consider The Impact of the Injunction Upon Non-Parties

A. The Injunction Constitutes a Violation of the Takings Clause

The District Court's use of the Republic's scheduled payments to the Exchange Bondholders as an instrument to compel the Republic to pay the Original Bondholders under the Original Bonds constitutes a taking. The District

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plaintiff in Red Mountain was able to implement the relief granted by the District Court as against the African Republic. See Charles G. Berry, 'Pari Passu' Means What Now?, N.Y.L.J., Mar. 6, 2006. In Elliott, a court in Belgium interpreted the pari passu clause and issued an injunction on behalf of Elliott based upon the submission of an *ex parte* application. Had the Brussels court considered all parties impacted by the injunction, as the District Court was instructed to do here, the result may have been different. See G. Mitu Gulati & Kenneth N. Klee, Sovereign Piracy, 56 Bus. Law. 635, 638 (2001). In LNC, the court in Belgium reversed its September 11, 2003 decision in March 2004. See Anna Gelpern, Building A Better Seating Chart for Sovereign Restructurings, 53 Emory L.J. 1115, 1134 n.65 (2004) (citing République Du Nicaragua contre LNC Invs. LLC, Euroclear Bank S.A., Gen. Docket No. 2003/KR/334 (Ct. App. of Brussels, 9th Chamber, Mar. 19, 2004); Vladimir Werning, Argentina Commentary, JP Morgan Emerging Markets Res., Mar. 23, 2004).

Court gave no consideration to the taking argument, a failure which alone warrants reversal. See Gannett Outdoor Co. of Michigan v. City of Pontiac, 948 F.2d 1288 (6th Cir. 1991); Woodward Sand Co., Inc. v. W. Conference of Teamsters Pension Trust Fund, 789 F.2d 691, 695 (9th Cir. 1986).

Appellees' entire taking position rises or falls on the contention that a taking requires the complete elimination of a property right. NML Br. pp. 51-52. However, Justice Scalia's opinion in Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env. Prot., 130 S. Ct. 2592, 2602 (2010), specifically stated that a judicial taking could occur if a judicial decision eliminates "*or substantially changes*" established property rights. 130 S. Ct. at 2602 (emphasis added). Indeed, four Supreme Court justices would recognize a compensable taking whenever "a court declares that what was once an established right of private property no longer exists." Stop the Beach, 130 S. Ct. at 2602. Moreover, a taking may be based upon "significant restriction . . . placed upon [the Exchange Bondholders'] use of [their] property." Me. Educ. Ass'n Benefits Trust v. Cioppa, 695 F.3d 145, 152 (1st Cir. 2012) (quotation omitted). The Supreme Court has opined that a regulatory taking may be found where the government imposes limitations that fall short of eliminating the entirety of a property right when, as here, it interferes with investment-backed expectations. See Palazzolo v. Rhode Island, 533 U.S. 606, 617-18 (2001) (citing Penn. Cent. Transp. Co. v. City of York, 438 U.S. 104, 124

(1978)). Interference with investment-backed expectations occurs when there is an inadequate history of similar government acts. See Vesta Fire Ins. Corp. v. Fla., 141 F.3d 1427, 1432 (11th Cir. 1998) ("Interference with investment-backed expectations occurs when an inadequate history of similar government regulation exists: where the earlier regulation does not provide companies with sufficient notice that they may be subject to the new or additional regulation.") (citation omitted).

In this case, the Exchange Bondholders' investment-backed expectations are manifest, as even the District Court recognized. See Injunction Opinion p. 8 ("the exchange bondholders bargained for certainty"); Fintech Br. pp. 18-19. The "bargain" made for that "certainty" was a greatly reduced payment. At minimum, the District Court should have considered the extent to which investment-backed expectations were implicated and adversely affected by its ruling. The failure to do so requires reversal. See Vesta, 141 F.3d at 1431-33 (reversing because, inter alia, lower court failed to consider economic impact on insurance companies and extent of investment-backed expectations).

Appellees also contend that "the government does not effectuate a taking simply because it makes it less likely that a party will honor its agreements." NML Br. p. 52. However, Appellees principally rely upon the discredited decision in Omnia Comm. Co. v. United States, 261 U.S. 502, 508-514 (1923) in support of

this "rule." In fact, Omnia says no such thing. See Cienega Gardens v. United States, 331 F.3d 1319, 1335 (Fed. Cir. 2003) ("Omnia does not support any such rule. The proposition in Omnia about consequential loss or injury refers to legislation targeted at some public benefit, which incidentally affects contract rights, not, as in this case, legislation aimed at the contract rights themselves in order to nullify them").

In fact, courts on many occasions have held that significant impairments of contractual rights can give rise to taking liability. See Ascom Hasler Mailing Sys., Inc. v. U.S. Postal Serv., 815 F. Supp. 2d 148, 173-76 (D.D.C. 2011) (finding questions of fact existed regarding customers' advance deposits to mailing services) (citing Cienega Gardens v. United States, 331 F.3d 1319, 1330 (Fed. Cir. 2003) (quoting Lynch v. United States, 292 U.S. 571, 579 (1934) ("The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a state or the United States."))); United States Fid. & Guar. v. McKeithen, 226 F.3d 412, 416-20 (5th Cir. 2000) (holding that additional restrictions on insurance company contracts and rates were a taking even though the entirety of the insurance company's business was not affected and only $5 million was at stake during first year) (citing E. Enters. v. Apfel, 524 U.S. 498, 528-29 (1998)).

B. The District Court's Injunction Fails to Comply with the Applicable Standards of Fed. R. Civ. P. 65

To defend the reach of the Injunction Opinion to the "Participants," Appellees contend that "this court has never held that the panoply of aiding-and-abetting standards applies to Rule 65." Aurelius Br. p. 22. Appellees are wrong, as it is well-settled that "'Rule 65(d) 'is designed to codify the common-law doctrine 'that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding.'" Doctor's Assoc., Inc. v. Reinert & Duree, P.C., 191 F.3d 297, 302-03 (2d Cir. 1999) (citing Heyman v. Kline, 444 F.2d 65, 66 (2d Cir. 1971) (quoting Regal Knitwear Co. v. NLRB, 324 U.S. 9, 14 (1945))); see also United States v. Paccione, 964 F.2d, 1269, 1274 (2d Cir. 1992) ("'a person who knowingly assists a defendant in violating an injunction subjects himself to [contempt]'" (quoting Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832 (2d Cir. 1930))). The enjoined non-party must "aid or abet the named parties in a concerted attempt to subvert" the "proscriptions" of the injunction. Rockwell Graphic Sys., Inc. v. DEV Indus., Inc., 91 F.3d 914, 919 (7th Cir. 1996); see also Vuitton et Fils S.A. v. Carousel Handbags, 592 F.2d 126, 129-30 (2d Cir. 1979).

Indeed, Aurelius itself acknowledges the validity of the aiding and abetting standard, stating: "[t]he essence of that rule [Rule 65] is that 'defendants may not nullify a decree by carrying out prohibited acts through aiders and abetters . . ."

Aurelius Br. p. 17 (quoting Regal Knitwear, 324 U.S. at 14). See also Aurelius Br. p. 32 ("their (BNY and other nonparties') sole obligation is to avoid aiding Argentina in a violation of the injunction."). Despite this acknowledgment, Appellees argue that "subjective intent" is irrelevant to Rule 65.[7] Aurelius Br. p. 22. But this contention is defeated by Aurelius' own interpretation of Alemite, 42 F.2d at 832. See Aurelius Br. p. 29 (citing Alemite for the proposition that "'a person who *knowingly* assists a defendant in violating an injunction subjects himself to contempt'") (emphasis added).[8] In fact, Goya Foods Inc. v. Wallack

[7] Appellees' reliance upon Eli Lilly & Co. v. Gottstein, 617 F.3d 186, 193 (2d Cir. 2010) in this regard fails, as the attorney admitted he had an interest in the documents in question, the property at issue belonged to the plaintiff (as the attorney knew), and the record did not indicate that the attorney acted separately from his client.

[8] Appellees contend that the "wrongful conduct" here is the "discrimination" against the Original Bondholders, "the very act prohibited by the injunction." Aurelius Br. pp. 15-16 n.5. Affixing the mere label of "discrimination" or "equal treatment" to a claim does not change the standard for aiding and abetting. E.g., Hurley v. Atl. City Police Dept., 174 F.3d 95, 127 (3d Cir. 1999) (applying common law aiding and abetting standards and Restatement of Torts in case of aiding and abetting gender discrimination), abrogated on other grounds by Nance v. City of Newark, 2012 WL 4857775 (3d Cir. Oct. 15, 2012). By Appellee's logic, in a race discrimination case brought by African American employees claiming salary discrimination in favor of white employees, the banks and payroll companies that issue checks to the white employees could be enjoined from issuing such checks even though they had no responsibility for the underlying race discrimination. That simply is not the law. E.g., Monastra v. NYNEX Corp., 2000 WL 1290596, at *7-8 (S.D.N.Y. Sept. 12, 2000) ("[I]n order to hold [defendant] personally liable as an aider or abetter, plaintiff must establish that he 'actually participate[d] in the conduct giving rise to a discrimination claim.'") (citation omitted). Moreover, it specifically has been held that a party that takes actions

Management Co., 290 F.3d 63, 75 (1st Cir. 2002), upon which Appellees heavily rely, specifically required plaintiff to demonstrate that the non-party had a guilty state of mind to be liable for aiding and abetting.

C. The Trustee, Clearing Brokers and Other Parties Should Not Be Covered by the Injunction

Appellees contend that parties such as BNY are aiders and abettors by virtue of their performance of such routine tasks as the receipt of funds, processing of payments, authentication of records, and the application of the Republic's payments as such constitute active concert or participation. Aurelius Br. p. 24. Far more intrusive forms of "assistance," however, have been found insufficient to qualify for aiding and abetting. See, e.g., In re Sharp, 403 F.3d 43, 50-53 (2d Cir. 2005) (bank's forbearance from foreclosure and nondisclosures which enabled a borrower to obtain money from other investors despite bank's knowledge of borrower's ongoing fraud was held not to constitute aiding and abetting);[9]

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pursuant to pre-existing duties cannot be held liable for aiding and abetting race discrimination. Jackson v. T & N Van Serv., 117 F. Supp. 2d 457, 466 (E.D. Pa. 2000) (union not liable for aiding and abetting race discrimination against African Americans when it defended white employees allegedly guilty of such discrimination because such defense "grew directly from the Union's duty to ensure that its members were only discharged for just cause").

[9] "A bank's mere acceptance of a loan repayment despite knowledge of the debtor's wrongful conduct does not rise to the level of aiding and abetting." Albion Alliance Mezzanine Fund, L.P. v. State Bank & Trust Co., 8 Misc. 3d 264, 269-71, 797 N.Y.S. 2d 699 (Sup. Ct. N.Y. Co. 2003), aff'd, 2 A.D. 3d 162, 767

American Bank of St. Paul v. TD Bank, N.A., 2012 WL 3105275, at *44 (8th Cir. 2012) ("'[a] bank cannot be held liable for aiding and abetting fraud or breach of fiduciary duty merely on the basis that it knew that the party it was lending to was not being forthright in its dealings with others.'") (quoting Glidden Co. v. Jandernoa, 5 F. Supp. 2d 541, 557 (W.D. Mich. 1998)).

The conduct of the alleged "Participants" cannot be considered aiding and abetting for several additional reasons. First, any payment to the Exchange Bondholders would be made pursuant to precisely made contractual arrangements. See Fintech Br. p. 21 (citing Paramount Pictures Corp. v. Carol Publ'g Grp., Inc., 25 F. Supp. 2d 372, 375 (S.D.N.Y 1998) (citing United Pharm. Corp. v. United States, 306 F.2d 515, 517 (1st Cir. 1962)); Herrlein v. Kanakis, 526 F.2d 252, 254-55 (7th Cir. 1971); see also O & L Assoc. v. Del Conte, 601 F. Supp. 1463, 1464-65 (S.D.N.Y. 1985)). The case law makes clear that parties acting pursuant to contracts that were entered into before the injunction in question was issued cannot be considered to be aiders and abettors. E.g., Blockowitz v. Williams, 630 F.3d 563 (7th Cir. 2010); Paramount, 25 F. Supp. 2d at 375-76.[10] In fact, it specifically

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N.Y.S. 2d 619 (1st Dep't 2003) (citing Atlanta Shipping v. Chemical Bank, 818 F.2d 240 (2d Cir. 1987)).

[10] Aurelius attempts to distinguish Paramount and Blockowitz on the ground that the alleged participants took no further action after the injunction was granted. Aurelius Br. p. 25. This purported distinction is groundless. In Blockowitz, the non-parties against whom an injunction was sought to be enforced continued to

has been held that "a clearing broker cannot be held liable as an aider and abettor simply because it performed its contracted-for services." In re Amaranth Natural Gas Commodities Litig., 612 F. Supp. 2d 376, 392-93 (S.D.N.Y. 2009); Greenberg v. Bear, Stearns & Co., 220 F.3d 22, 29 (2d Cir. 2000); Stander v. Financial Clearing & Servs. Corp., 730 F. Supp. 1282, 1286 (S.D.N.Y. 1990).

Second, the Trustee, DTC, and the other non-parties are independent, arms-length actors seeking to enforce their own independent contractual rights and meet their own contractual obligations having nothing to do with Appellees. See Fintech Br. pp. 22-23 (citing Parker v. Ryan, 960 F.2d 543, 546 (5th Cir. 1992); E.A. Renfroe & Co. Inc. v. Moran, 338 Fed. App'x 836, 840 (11th Cir. 2000); Microsystems Software Inc. v. Scandinavia Online AB, 226 F.3d 35, 43 (1st Cir. 2000)).[11] In particular, a lender's discretionary actions in its perceived own best

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perform a contract that had been entered into before the injunction and "ignored the injunction." Blockowicz, 630 F.3d at 569. In Paramount, non-party retailers and distributors continued to sell books allegedly infringing the plaintiffs' copyright even after an injunction was entered.

[11] The cases Appellees cite on this point are inapposite. Goya involves the sale of a "lavish" Park Avenue cooperative apartment in violation of a court order enjoining the transfer of assets held in the name of the wife of a judgment debtor trying to recoup his inheritance. Goya, 290 F.3d at 67. In Goya, the owner had a guilty state of mind when it violated the injunction. Additionally, here, the Injunction prevents the Exchange Bondholders from receiving distributions on securities they own, not Appellees. Reliance Ins. Co. v. Mast Constr. Co., 84 F.3d 372 (10th Cir. 1996) is also inapposite because here, the Trustee and any of its paying agents are not the Republic's banks and any funds they hold or will hold belong to the Exchange Bondholders, not the Republic or the Appellees. See also

interests does not "substantially assist" its borrower's alleged fraud upon another lender. See Albion, 8 Misc. 3d at 271-73; In re Sharp, 403 F.3d at 50-53; Liberty Sav. Bank, FSB v. Webb Crane Serv., Inc., 2005 WL 1799300 (D. Colo. July 27, 2005) (approving of Sharp).

D. Appellees' and Amici's U.C.C. Arguments Ignore the Reality of the Payments in Question

The U.C.C. is not to be interpreted in a manner which places "form over substance." See, e.g., Avant Petroleum, Inc. v. Banque Paribas, 652 F. Supp. 542, 548 (S.D.N.Y. 1987). But the Appellees and Professor Mann base their U.C.C. argument on the fiction that each payment due from the Republic to the Exchange Bondholders is made up of a series of "originators" and "beneficiaries," with no explanation as to why any of the "originators" or "beneficiaries" has assets of the Republic. Pursuant to the express terms of the Indenture, monies received by BNY are for the benefit of the Exchange Bondholders – the true beneficiaries.[12] The

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Fintech Br. p. 23 n.9. Waffenschmidt v. McKay, 763 F.2d 711, 715 (5th Cir. 1985) is similarly inapplicable because the defendant was involved in securities fraud and attempted to keep stock proceeds on investments that were not his.

[12] See Indenture §§ 2.4 ("the Holder [of Debt Securities] is entitled to the benefits of this Indenture"); 3.1 ("All monies . . . paid to the Trustee under the Debt Securities and this Indenture shall be held by it in trust for itself and the Holders of Debt Securities . . ."); 3.2 ("the Republic shall pay such [Additional Amounts] as will result in receipt by the Holders of Debt Securities . . ."); 3.5 ("The Trustee may also appoint . . . one or more paying agents . . . for the purpose of facilitating the Republic's payments of amounts due in respect of the Debt Securities of any Series for the exclusive benefit of the Holders of such Debt Securities.").

next immediate transferees – whether transfer agents, clearing systems, and/or registered holders – also are not the "beneficiaries" of the Republic's payments. Each of these institutions merely has a role in transferring each Exchange Bondholders' property to it.

Moreover, while Appellees claim to be "baffled," carving out by the mere label "intermediary" banks from the Injunction does not satisfactorily protect the payment mechanism at issue here. Being an intermediary bank is a function, not a label or name on the door. U.C.C. § 4-A-104 ("Intermediary bank" means a receiving bank other than the originator's bank or the beneficiary's bank). Appellees implicitly acknowledge the dangerous over-breadth of the Injunction by relying upon Appellees' "cure all" for all of the problems with the current Injunction – numerous non-parties being hauled into court to defend themselves at contempt hearings. See Aurelius Br. pp. 13, 28-30, 43.

Professor Mann's amicus brief helps to demonstrate the legal gymnastics in which Appellees must engage to try to support the Injunction. Professor Mann first argues that the completed payment to the beneficiary for the purpose of U.C.C. § 4-A-503 is the payment from the Republic to BNY. See Mann Br. pp. 15-17. Then, in trying to explain why the relief provided in the November 21 Orders does not act as an "attachment" in violation of U.C.C. § 4-A-502, Professor Mann concedes that the Injunction "merely enjoins the completion of the payment"

(Mann Br. p. 15) while it is in BNY's possession, acknowledging that the completion of payment does not occur until it reaches the true beneficiary, the Exchange Bondholders, such as Fintech. Appellees cannot have it both ways.[13]

Appellees further argue form over substance by trying to differentiate whether an order is labeled as an "injunction" instead of an "attachment." Here, the Court's Injunction strips the Exchange Bondholders of money that already passed into their ownership upon reaching BNY. The Injunction before this Court is more akin to an "attachment" than to a prospective injunction. In fact, in Janvey v. Libyan Inv. Auth., 478 Fed. App'x 233, 236 (5th Cir. 2012), the court specifically found that an order "freezing" funds is effectively an attachment even though it was labeled as an "injunction." Where, as here, the "injunction" has the effect of freezing funds, it in reality serves the "same purpose as an attachment." Id.[14] See also Weston Compagnie de Finance et D'Investissement, S.A. v. La Republica del Ecuador, 1993 WL 267282, at *3 (S.D.N.Y. July 14, 2003) (rejecting contention that Section 503 did not apply to the dispute "because that

[13] Moreover, Professor Mann cites U.C.C. § 4-A-503(iii) as authorizing restraint of funds being released from the beneficiary bank to the beneficiary (Mann Br. pp. 15-16) – but BNY is *not* Fintech's bank.

[14] Of course, the Injunction here has the effect of "freezing" the funds owed to the Exchange Bondholders and has in effect "frozen" those bonds already driving down their value as a result of the threatened restrictions upon their payment stream.

section relates to injunctions, not attachments. . . . The term 'creditor process' is a generic term and covers a variety of devices by which a creditor can seize an account").[15]

Professor Mann's citation to the Official Comment to U.C.C. Art. § 4A-502(d) (Mann Br. pp. 8-9) helps illustrate Appellants' point: (i) creditors of the originator should look to the originator's bank, which is the only bank with assets of the originator (here, Appellees are creditors of the Republic); and (ii) creditors of the beneficiary should look to the beneficiary's bank. But Appellees are *not* the creditors of the Exchange Bondholders, and BNY and the other intermediary transferees (who process the Exchange Bondholders' funds) also do not have debtor-creditor relationships with Appellees. Thus, the monies in BNY's and the other intermediary banks' possession, which belong to the Exchange Bondholders as beneficiaries, should be beyond the reach of a remedy to assist Appellees, whether through the mechanism of "injunction" or attachment.

[15]As the Republic properly argued at pp. 33-40 of its opening brief, U.C.C. §§ 4-A-502 and 503 must be read in conjunction with each other. See Kokoszka v. Belford, 417 U.S. 642, 650 (1974). While U.C.C. § 4-A-503 expressly states that the court may properly enjoin a party with "proper cause," U.C.C. § 4-A-502 narrows the basis for such an injunction to "the debt owed by that bank to the beneficiary." Here, the "debt" that is owed to the Original Bondholders is owed by the Republic, not by the Exchange Bondholders. Accordingly, any distributions received by BNY should not be enjoined from reaching their rightful owners, the Exchange Bondholders.

IV. BNY's Effort to Obtain an Order Protecting It In the Event the Injunction Stands Must Be Denied

BNY claims that it will face a "potential conflict" between its obligations to the Exchange Bondholders pursuant to the Indenture, and its obligations to the Court through the Injunction Order. BNY Br. pp. 40-43. As a result, BNY seeks "clarification" that it will not be subject to claims by the Exchange Bondholders in the event it does not make payments to them. Fintech respectfully submits that BNY's request should be denied.

As a preliminary matter, BNY's request for "clarification" in respect of its potential liability resulting from compliance with the Injunction Order seeks an advisory opinion from this Court. It is well-settled that advisory opinions or even simple answers to general questions may not be given by federal courts. See United States v. Fruehauf, 365 U.S. 146, 157 (1961). Moreover, whether BNY will violate its duties as a Trustee under the Indenture by complying with the Injunction Order is not a matter ripe for this Court to decide. See City of New York v. U.S. Dep't of Comm., 739 F. Supp. 761, 765 (E.D.N.Y. 1990) ("A matter is ripe when there is a genuine need to resolve a real dispute") (citation omitted).

BNY claims that Plaintiffs have expressed their agreement that the Trustee would not be liable under the Indenture for complying with the Injunction Order. BNY Br. p. 41 n.10. But as this Court well knows, Plaintiffs, as Original Bondholders, are not parties to the Indenture. Indeed, the Indenture is a

contractual arrangement between the Trustee and the Exchange Bondholders. Certainly, the Exchange Bondholders, including Fintech, have not expressed their "general agreement" that BNY is not liable under the Indenture in the event BNY breaches its provisions. Rather, as the Exchange Bondholders already have argued, the likelihood for considerable litigation by the Exchange Bondholders, including Fintech, in the event that the Trustee violates a provision of the Indenture, is significant. See e.g., Fintech Br. p. 35; EBG Br. p. 25; Euro Bondholders Br. p. 29; Ice Canyon Br. p. 34. BNY cannot use this case to which neither it nor the Exchange Bondholders are a party to obtain a ruling concerning the rights and obligations between them.

CONCLUSION

For the reasons set forth herein and in its moving brief, Fintech respectfully requests that this Court reverse and vacate the November 21 Orders.

Dated: New York, New York
February 1, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with Fed. R. App. P. 32(a)(7)(b) which requires that the principal brief contain no more than 7,000 words because it contains 6,805 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: New York, New York
February 1, 2013

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